22205

NO. 22205

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OCT 1 1968

BATRIS W. PEROVICH, dba B. W. PEROVICH CONSTRUCTION COMPANY,	)
Appellant,	)
vs.	)
PIPE LINING, INC., et al,	)
Appellees	)

APPELLANT'S OPENING BRIEF

FILED

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McKENNA & FITTING
LES J. [illegible]EINSTEIN
AARON M. [illegible]ECK
417 [illegible]est Fifth Street
Los Angeles, California 90013

Attorneys for Appellant Batris W. Perovich, dba B. W. Perovich Construction Company

TOPICAL INDEX

ACT FOR WHICH THE SANCTIONS WERE IMPOSED DID NOT ITSELF WARRANT DISMISSAL. IN ANY EVENT, HOWEVER, IT WAS MANIFESTLY AN ABUSE OF DISCRETION FOR THE DISTRICT COURT TO REFUSE TO PERMIT THE SANCTIONS TO BE PAID ONLY EIGHTEEN DAYS LATE WHEN PLAINTIFF DID NOT HAVE THE FUNDS AVAILABLE ON THE DUE DATE, AND THERE WAS NO SHOWING WHATEVER THAT THE LATE PAYMENT WOULD IN ANY WAY PREJUDICE THE REMAINING DEFENDANT.

Conclusion

TABLE OF AUTHORITIES CITED

Statutes

Other Authorities

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I.

STATEMENT OF JURISDICTION

Federal law provides that the United States District Courts shall have original jurisdiction of any civil action or proceeding arising under ny Act of Contress . . . protecting trade and commerce against restraints nd monopolies". (28 U.S.C. §1337). The action below was predicated pon Federal antitrust laws, specifically the Sherman Antitrust Act, 5 U.S.C. §1, et seq., and the Clayton Act, 15 U.S.C. §15 (C.T. page 490, nes 5-8).

This court has jurisdiction over the instant appeal pursuant to 28 U. S. C. § 1291, which provides that "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . " The order dismissing the action below is a "final decision" of the District Court and is therefore appealable. Lyford v. Carter, 274 F. 2d 815 (2nd Cir. 1960); Haldane v. Chagnon, 345 F. 2d 601, 602-603 (9th Cir. 1965); United States v. Shelley, 218 F. 2d 157, 158 (2nd Cir. 1954).

II.

STATEMENT OF ISSUES

1. Did the District Court abuse its discretion in refusing Plaintiffs' new counsel more than 99 days in which to review an enormous record in three separate antitrust actions, including approximately 90,000 exhibits couched in a technical jargon which was unintelligible to Plaintiffs' new counsel; to make any and all motions prerequisite to the preparation of a document, denominated a "trial brief", which required the setting forth in detail of "[t] he facts which each plaintiff expects to prove in support of each claim for relief, [t] he legal issues, contentions, and supporting authorities related to each claim for relief, including plaintiff's contentions as to its theory and measure of damages pertaining to each claim . . . [such contentions including] a detailed, narrative statement of all expert testimony plaintiff proposes to introduce at trial" [C. T. 3203, line 25, to 3204, line 8], and which could not be

completed until the Plaintiffs were substantially ready for trial; and then to prepare the "trial brief", even though the granting of additional time in which to accomplish the foregoing would not have in any way delayed the trial of the actions?

2. Did the District Court err in dismissing the action below for failure to pay sanctions when the sanctions were imposed upon Plaintiffs for an act, Plaintiffs' discharge of their attorney, which the District Court concluded did not itself warrant dismissal?

3. Did the District Court err in refusing to permit sanctions to be paid 18 days late when Plaintiffs did not have the funds available to pay the sanctions on the due date, and when there was no showing that the late payment would in any way prejudice the remaining Defendant?

4. Did the District Court err in denying Plaintiffs' motions to file in the action below and in action No. 63-321 amended complaints, alleging substantially the same facts as the existing complaints, the purpose of which was to clarify that Plaintiffs, whose existing complaints were predicated upon 15 U.S.C. §1, et. seq., were alleging a claim under 15 U.S.C. §2; to vacate or modify a protective order issued by the District Court which precluded the two persons available to Plaintiffs' counsel with the ability to assist them in interpreting 90,000 documents couched in a technical jargon largely unintelligible to Plaintiffs' counsel, which would have to be reviewed in connection with the preparation of the "trial brief", from access to those documents; and to reconsider and/or clarify certain

discovery rulings which the Defendants construed as precluding Plaintiffs from inquiring into a general conspiracy in the pipe industry without first showing that the general conspiracy included the aspect of the industry in which Plaintiffs were engaged, when the District Court acknowledged that the granting of these motions would require giving Plaintiffs additional time to file the trial brief?

III

STATEMENT OF THE CASE

This appeal is from the dismissal of the action below - - after it had been pending for more than four years, a record of over 4,000 pages (excluding depositions and exhibits) had been amassed, extensive discovery had taken place, and the case was approaching trial - - for lack of diligent prosecution; and - - although the Appellant did not have the funds available to pay them on their due date, and when funds became available offered to pay them 18 days late - - for failure of Appellant to pay sanctions of $328.08 to Appellee's counsel. [C. T. page 3877, lines 1-10; page 3934, lines 3-15; pages 3957-3974].

The action from which the within appeal is taken, Perovich v. Pipe Linings, Inc., et al., No. 63-278, was one of three related antitrust actions commenced in the United States District Court for the Southern (now Central) District of California, in March of 1963.[1] [C. T. 2]. The

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[1] The others were Northwest Pipe Linings, Inc. v. Pipe Linings, Inc., et al., and Inplace Linings v. Pipe Linings, Inc., et al., United States District Court for the Southern (now Central) District of California, Nos. 63-279 and 63-321, respectively. These cases are not presently before this (Cont.)

respective Plaintiffs were Batris W. Perovich ("Perovich") the Appellant herein, a corporation of which Perovich was president, Northwest Pipe Linings, Inc. [R. T. 1/17/67, page 129, lines 5-7], and a third corporation, Inplace Linings, Inc., of which one Charles Davin ("Davin") was president. [C. T. 2860]. Since they all dealt with the inplace lining of steel and concrete pipe, the three cases were consolidated for pretrial and discovery purposes [C. T. 1429], and are referred to herein collectively as the "Perovich actions".

The gravamen of the Perovich actions was a conspiracy to fix prices and allocate markets among various manufacturers of steel and concrete pipe, including the Appellee herein, United Concrete Pipe Corporation ("United"). [C. T. 2-13]. In No. 63-278, Perovich alleged that since December, 1958, he ". . . has been engaged in the State of California in the business of the inplace rehabilitation of pipe by means of the application of cementious material by a process commonly known as the 'Tate Process', and by the application of cementious material by centrifugal force, in direct competition with [certain of] the Defendant[s]. . . " including United [C. T. page 491, line 31, to page 492, line 5]; that these Defendants ". . . entered into an unlawful conspiracy to apportion and divide all of the business of the inplace rehabilitation of steel and cast iron pipe inplace in the State of California . . . . [as a result] the Defendants have monopolized within the State of California the business of the inplace rehabilitation of pipe inplace, to the exclusion of all other persons, including

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Cont.) Court. The latter was settled during the pretrial period [C. T. 3873; C. T. 3890; C. T. 3939], and while the former was dismissed [C. T. 3957] with the action below, no appeal from its dismissal is being prosecuted. The procedural histories of the three actions are inextricably interwoven, and it is essential to an accurate and undistorted presentation of what occurred in the District Court that there be no arbitrary amputation of the action below from the other actions for purposes of analysis.

the Plaintiff . . . [C. T. page 492, lines 8-30], that the Defendants, including United, " . . . have conspired to bid and contract to take each and every job or contract for the inplace rehabilitation of pipe, on all jobs and contracts involving the inplace rehabilitation of cast iron and steel inplace where the Plaintiff was a bidder, below their actual cost, in order to deprive the Plaintiff of the opportunity of performing said job or contracts" [C. T. page 493, lines 1-7]; that these Defendants " . . . have agreed to apportion the taking of the aforesaid contracts below cost inter se in order that no one of . . . [them] would be required to bear more than its proportionate share of the losses incurred . . . " [C. T. page 493, lines 7-14]; that these Defendants " . . . attempted to eliminate all other parties, including the Plaintiff, from the business of the inplace rehabilitation of steel and cast iron pipe" [C. T. page 493, lines 20-24]; and, that as a result of the unlawful acts of the Defendants, including United, Plaintiff " . . . sustained damage to his business and property and loss of business and business profits, in the sum of $200,000.00" [C. T. page 494, lines 24-29][2]. In addition, the complaint contained a count charging the Defendants with violating the antitrust laws through a conspiracy which embraced " . . . the manufacture and sale of all grades and types of concrete pipe . . . ", including the inplace rehabilitation of pipe, through allocating among themselves the pipe business in the western states. [C. T. page 495, line 3, to page 500, line 32]. The other actions were substantially the same [C. T. page 905, lines 4-6], but dealt with different geographical areas -- Washington and Oregon for No. 63-279, and Oklahoma, New Mexico and Texas for No. 63-321. [Deposition of Batris W. Perovich, 4/19/63, page 104, lines 13-15; Deposition of Charles O. Davin, 5/8/63; page 40, line 1 to page 41, line 22; C. T. page 3673, lines 15-21.]

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[2] At his deposition, Perovich alleged that his company did not receive a job after 1961 and that he was ultimately forced to sell off the major part of his equipment. [Deposition of Batris W. Perovich, 4/19/63, page 13, line 10 to page 17, line 14]. Hence the damage which Perovich allegedly

claim was redressable because Perovich had previously executed a general release in their favor which allegedly barred this action. [C. T. page 978, line 4, to page 979, line 25; page 942, line 26, to page 944, line 15; page 948, line 24, to page 950, line 32; page 968, line 32, to page 971, line 8].

Approximately one year after the Perovich actions were filed, on March 10, 1964, a federal grand jury returned indictments against a number of pipe manufacturers, including United and its officers and directors, charging them with a conspiracy (to which they ultimately pleaded nolo contendre) to violate the antitrust laws by price fixing and market allocation. [C. T. page 3960, lines 4-12, lines 27-32]. Perovich was credited with "blowing the whistle" on the conspiracy. [C. T. 3960, lines 9-12].

In December of 1964, this Court ordered all of the "western pipe cases" pending in the District Courts of the Ninth Circuit transferred to the District Court in which the Perovich actions were pending [C. T. 3960, lines 13-19], and they were ultimately assigned to District Judge Martin Pence.

The attorneys for the Plaintiffs in the Perovich actions prior to July of 1964 was the firm of Meserve, Mumper & Hughes, by Richards D. Barger, Esq.[3] In July of 1964 they were discharged, and John Joseph Hall, Esq., was substituted in their place. [C. T. 1426-1427; R. T. 1/17/67, page 19, lines 3-10; page 29, lines 10-13; page 35, lines 4-20].

Mr. Hall, a patent lawyer, was a sole practitioner with little antitrust experience. [R. T. 1/17/67, page 68, lines 18-24; page 76, lines 14-18; page 115, line 20, to page 116, line 12]. Yet, despite his limited experience and the fact that he had arrayed against him the combined manpower, experience and ability of the law firms of Gibson, Dunn & Crutcher, Hill, Farrer &

[3] The evidence in the record as to why they were discharged indicates that Mr. Perovich felt they were too lenient about giving extensions to the Defendants. [R. T. 1/17/67, page 105, lines 3-8].

Burrill, Sheppard, Mullin, Richter & Hampton, and Richards, Watson & Hemmerling, Mr. Hall's constribution to preparing the cases for trial, including extensive discovery, is apparent from the record.

By late in 1966 pretrial proceedings were in an advanced stage, and the problem of scheduling the final phase of the Perovich actions--consisting principally of the Plaintiffs' trial brief, Defendants' motions for summary judgment to test Plaintiffs' cases as set forth in the trial brief, and the trial itself--arose. Such scheduling was discussed on October 3, 1966 [R.T. 10/3/66, page 25, line 13, to page 26, line 16]; and on October 17, 1966, the District Court entered Pretrial Order No. 4, prepared by counsel for United, which scheduled the trial brief for December 15, 1966 [C.T. 3203, line 25, to 3204, line 8]; the Defendants' motions for summary judgment for December 22, 1966 [C.T. 3204, lines 9-11]; the Plaintiffs' memoranda in opposition to Defendants' motions for summary judgment for December 28, 1966 [C.T. page 3204, lines 12-14]; and the trial itself for February 13, 1967. [C.T. page 3209, lines 2-4]. Mr. Hall specifically objected to the December 14, 1966 deadline.[4] [C.T. page 3209, lines 10-12].

While denominated a "trial brief", the document in question was, in effect, a detailed blueprint delineating Plaintiffs' conduct of the trial, consisting of:

> "a. The facts which each plaintiff expects to prove in support of each claim for relief, distinguishing between those facts which plaintiff contends, on the basis of the answers, or otherwise, are admitted and those which are contested;
>
> "b. The legal issues, contentions, and supporting authorities related to each claim for relief, including plaintiff's contentions

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[4] Pretrial Order No. 4 also required Plaintiffs to complete their remaining deposition discovery "during the period November 7th through December 1, 1966", so that Mr. Hall would be taking depositions at the same time he was working on the trial brief. [C.T. 3202, lines 29-31].

as to its theory and measure of damages pertaining to each claim and the party bearing the burden of proof on each issue. Plaintiff's contentions as to the measure of damages should include a detailed, narrative statement of all expert testimony plaintiff proposes to introduce at trial." [C.T. 3203, line 28, to page 3204, line 8].

To quote Judge Pence, ". . . there must be in the trial brief subjunctively [sic] and fundamentally the basic foundation of the plaintiffs' case . . ." [R.T. 12/13/66, page 58, lines 21-23]; its filing would, in effect, mean that the Plaintiffs were ready for trial.

Judge Pence recognized that it might not be possible for Mr. Hall to complete the trial brief by the date specified in the order. As stated by Mr. Hall:

". . . there was a discussion in court [on December 13, 1966] about the time for filing the trial brief pursuant to Pretrial Order No. 4 . . . Judge Pence . . . asked me whether I could get the trial brief finished by December 15 as specified in Pretrial Order No. 4 . . . I . . . told Judge Pence I could use additional time, and . . . in open court I . . . said that I could get it in by the 21st . . . after the formal hearings were over in San Francisco . . . there was a discussion in Judge Pence's chambers where Judge Pence was present and defense counsel were present as well as myself . . .

"At that time as part of our discussion, which was off the record, Judge Pence told me that in effect I should take more time to prepare the trial brief. That in view of my situation, it wouldn't be possible to get the trial brief done in time, even on the 21st of December [1966].

"A further discussion then took place in chambers at this time which was to the effect that I should get together with defense counsel to work out a time period for the preparation and filing

of the trial brief in these cases, and that if we couldn't reach agreement, that Judge Pence would resolve the matter at the next scheduled hearing which was on December 30, 1966."

[R. T. 1/17/67, page 71, line 1, to page 72, line 1; emphasis added].

By mid-December of 1966 Mr. Hall, who had been working on the Perovich actions on a substantially full time seven-day week basis since August of 1966 [R. T. 1/17/67, page 73, lines 5-14][5], was admittedly exhausted from his labors. [R. T. 1/17/67, page 76, lines 1-6]. Yet still looming ahead of him was some remaining pretrial proceedings - - including particularly the trial brief - - and ultimately the trials themselves. On December 14, 1966, the day before the trial brief was ostensibly due, Mr. Hall met with Mr. Perovich and informed Mr. Perovich that he could not complete the trial brief by December 15th, or even by December 21st. [R. T. 1/17/67, line 18, to page 72, line 18].

Mr. Perovich was opposed to any delays whatever in the filing of the trial brief:

"Mr. Perovich told me (Hall) that he wanted me to complete and file the trial brief by December 21, because he did not want the trial date of February 14 to be changed. He wanted to hold fast to that date.

* * *

". . . he felt that any delay would be to his disadvantage in the case

* * *

"He told me that any delay in the trial brief would cause an additional delay of the trial date, which he did not want at all cost." [R. T. 1/17/67, page 72, line 8 to page 74, line 5].

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[5] Judge Pence complimented Mr. Hall as "a hard working man" [R. T. 12/13/66, page 58, line 15], and "felt he (Hall) was pacing himself too hard and I told him not to kill himself." [R. T. 3/18/67, page 17, lines 1-3].

At the end of the conversation, Mr. Perovich informed Mr. Hall that:

"He was going to get another attorney, and that he didn't want me [Hall] any more in the case, and good-by. With that he walked out the door." [R.T. 1/17/67, page 73, lines 22-24].

The discharge (no substitution was yet filed) pertained to only two of the Perovich actions; the instant case and Northwest Pipe Linings, Inc., et al, No. 63-279. Mr. Hall, however, immediately attempted to telephone Charles Davin, president of the third corporate plaintiff, Inplace Linings, Inc., in Texas, and reached him several days later. He advised Mr. Davin that because of Mr. Perovich's actions, he was withdrawing as counsel for Inplace Linings, Inc.; and that, in any event, because of his exhaustion, it would probably be advantageous for Inplace Linings, Inc. to secure other counsel to try the case:

"A I called Mr. Davin in the evening of December 14, but he was not at home, in Texas. I kept trying to get a hold of him later by long-distance telephone, but I did not get a hold of him until a day or two later.

" I told him what had happened and my discussion with Mr. Perovich, that Mr. Perovich had discharged me. I further told Mr. Davin that under the circumstances I felt that it was best for him to get other counsel. That since the cases were somewhat inter-related, it would be better to have the same counsel on all of these cases.

"I further told him that I thought it would be better for him from a trial standpoint also, because I had just about worn myself out in preparing these cases, and that the schedule that was set up in the next two or three months for trial was a very difficult one for me to meet; especially

"Q Did you tell him in substance or effect that the business of preparing the brief had exhausted you?

A I told him that because of my condition, due to the heavy deposition schedules and hearings that I had just been going through, that I could not meet the schedule for filing the trial brief proposed by Pretrial Order No. 4, or even on the 21st of December." [R.T. 1/17/67, page 75, line 15, to page 76, line 13].

Perovich soon had a change of heart regarding his action in discharging Hall and, two days later, asked Mr. Hall to finish the brief. Mr. Hall refused:

"A Our disagreement happened on a Wednesday. On Friday, I came back to his office. Friday morning I came back to his office and asked him if he would stay on the case.

* * *

"THE COURT: What was his response?

A He said he just could not do it, that he committed himself on some other cases, or something to that effect, and that he could not do it." [R.T. 1/17/67, page 151, line 25, to page 152, line 16].

Upon discharging Hall, Perovich immediately set about to secure other counsel. His efforts were not fruitful. He contacted a number of antitrust lawyers in several states [R.T. 1/17/67, page 129, line 16, to page 132, line 25], but none was willing to take the cases:

"Q [BY MR. WEINSTEIN] And between the 14th of December and January 10, 1967, did you [Perovich] make an effort to contact other lawyers with a view toward employing them to carry your two cases forward?

A Yes.

Q Would you name each attorney that you contacted?

A I contacted Maxwell Blecher. I called him in San Francisco, and they had informed me that he was in Hawaii. I got his phone number, and I called him there. I also talked at some length with Mr. Ferguson and Mr. Burdell. As I had related to the court here that Friday, I was on my way to San Francisco to meet them in San Francisco to discuss the case.

Q When were you to meet them in San Francisco?

A On Wednesday.

* * *

"THE COURT: January 4, that would be.

THE WITNESS: Yes. Thank you, your honor. It is January 4.

BY MR. WEINSTEIN:

Q What other attorneys did you contact?

A I contacted a man--I tried to get his office--it was a man named Matthew--I don't recall his last name.

THE COURT: Would it be Maxwell Keith?

THE WITNESS: No. Matthew --

BY MR. WEINSTEIN:

Q Mitchell?

A Yes. He is with a new firm in San Francisco. I tried getting in touch with him, but he was out until the 16th.

I then called the firm--a man by the name of Maxwell Keith. He was going to be out until Tuesday.

Q When did you call him?

A I tried to call him on Friday, the 6th, January 6th,

I then called Max Keith's office back, I believe, it was in the late afternoon, and talked to him about the case. He had recommended a firm, because it was in San Francisco, down here called--I have them all written down somewhere, but his name was Stanley Brown. This was also on Friday of that same day, January 6. He said he wanted to look at the files at the court house, which was here, and would contact me back on Monday. He contacted me on Monday, and he said he just couldn't take it. It was too big of a case.

I called two others, and I just can't recall their names. They are here in Los Angeles.

Q How many different attorneys did you reach in an effort to ask them to take your case?

In other words, I want you to exclude those that you never actually made contact with, because they didn't answer their phone or return your call.

A Five or six.

Q Did all of them tell you that they would be unable to take the case?

A Yes.

Q Mr. Blecher tell you he was too busy?

A He was too busy.

Q What did Ferguson and Bardell tell you?

A They were working on a large case that they had hoped would settle. It was a turbine case, or something, and it was awkward from Seattle and Los Angeles, and they had recommended me to try and get a firm here in Los Angeles that would be close, because a time element was also very tight.

A Matthew Mitchell I couldn't reach. He wouldn't be back in the office until the 16th.

Q How about Maxwell Keith?

A Yes. I called him, as I mentioned, Friday morning. He was out. I left a call for him to return the call, and I got in touch with him, I believe, in the afternoon. Also I remember another person was Pugh.

Q Keith Pugh?

A Yes. I get mixed up with those, but I got in contact with him. I believe he was out until the following Tuesday.

Q All of these people that you did communicate with told you for one reason or another that they could not take your case?

A Yes."

[R.T. 1/17/67, page 129, line 16, to page 132, line 25].

When he perceived the difficulty which he would encounter in securing other counsel, Perovich once again appealed to Hall to complete the trial brief, but Hall refused:

"BY MR. MILLER:

Q . . . after the date you discharged Mr. Hall, and before January 13, at any time did you discuss with Mr. Hall the possibility of his going ahead and working on the plaintiff's trial brief?

A Well, after I came back from San Francisco, I asked Mr. Hall if he would help me in getting--helping us getting the trial brief out.

Q And what did he say?

commitments, and he just couldn't do it."

[R.T. 1/17/67, page 151, line 5, to page 151, line 14].

On December 30, a Pretrial Conference was held before Judge Pence, at which Perovich, who had not yet secured other counsel, was present.[6] Perovich informed the court of what had transpired with respect to Mr. Hall and his efforts to secure other counsel. He stated that he had contacted a Spokane, Washington law firm, Ferguson and Burdell, that he felt would be substituted in as counsel in the Perovich actions. He indicated, however, that Ferguson and Burdell had not yet agreed to take the cases:

"MR. PEROVICH: . . . I have gotten in touch with Mr. Ferguson and Mr. Burdell in Seattle, and during the holidays we were kind of held up getting everything completed.

But I believe they will be the trial attorneys on my cases.

THE COURT: You don't make that as a positive statement, I take it?

MR. PEROVICH: We still have another meeting with them next week, the first part of next week, right after the New Year's."

[R.T. 12/30/66, page 7, lines 13-23].

Although Perovich had not retained counsel, Judge Pence, in Pretrial Order No. 5, rescheduled the date for filing the trial brief to January 13, 1967. Thus, whatever new counsel Perovich secured would have approximately two weeks (less the time that would elapse between December 30 and the date on which he was retained), in which to, in effect,

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[6] As testified by John Joseph Hall, Esq., Judge Pence had planned prior to Perovich's discharge of his counsel to hold a hearing on December 30, if Hall and defense counsel were unable to agree on a new deadline for the filing of the trial brief, in order to schedule such a deadline.

become prepared to try three complex antitrust cases.

The Pretrial Order warned that:

"In the event the brief is not so prepared and filed [by January 13, 1967], and good cause is not shown, the Court will entertain a motion for dismissal of the above entitled cases."[7]

As it turned out, Ferguson and Burdell refused to take the case. Ultimately, a Texas lawyer to whom Perovich and Davin had ultimately resorted in their search for counsel, Anthony Atwell, Esq., referred Perovich and Davin to Les J. Weinstein, Esq., of McKenna & Fitting:

"MR. WEINSTEIN: . . . on the afternoon of January 9, 1967, I received a telephone call from an attorney by the name of Anthony Atwell from the law firm of Atwell, Grayson & Atwell, in Dallas, Texas. Mr. Atwell knew of the firm of McKenna & Fitting and me by reason of the fact that his law partner was associated in another antitrust case with us not long before this.

"The first thing he asked me was whether or not our office had any conflict of interest that would prevent us from taking any of the Pipe cases, and I told him that we did not. He stated to me, 'Well, between the firms representing steel companies and pipe companies and those with connections,

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During the course of the hearing on December 30, Judge Pence stated: "As I say, this reminds me of the situation I had recently in Honolulu in which a corporation in an antitrust case seemed to have some problem in getting counsel and having counsel present when the matters were especially called, so I exercised the prerogative to dismiss for the lack of prosecution.

"I don't say I am going to do that in these cases. I simply said I have done it, and recently."
[C.T. 12/30/66, page 10, lines 2-9].

you are probably the only office in Los Angeles that doesn't have that type of conflict.'

" He said he had two people that are very much in need of an attorney. They no longer have an attorney. The cases are pending in Los Angeles, and they have asked if our firm would handle them since we are handling one of the Texas Pipe cases. He said it is obviously impossible for us to do so, and I am wondering if you would give consideration to handling the cases. I said we would at least look at it.

" He said, 'Well, would you do me a favor? If you can't handle them, would you help them find another attorney', and I expressed to him my feeling that if we could not, we would assist them, Mr. Davin, to find another attorney, because he had indicated to me that Mr. Davin had had some difficulty in finding an attorney."

[R.T. 1/17/67, page 121, line 3, to page 122, line 5].

Mr. Weinstein first met with Perovich and Davin on January 10, pproximately 4:00 o'clock P.M. [R.T. 1/17/67, page 122, lines 11-17]. of that date, the deadline for filing the trial brief was only three days away.

A week later, on January 17, a hearing was held before Judge ence. At this time no formal order substituting out Mr. Hall as counsel r the Plaintiffs had been entered. Nevertheless, Mr. Hall was not present the hearing, and Judge Pence treated the Plaintiffs--including the two rporations--as though they were appearing <u>in propria persona.</u> [R.T.1/17/67, ge 4, line 3, to page 5, line 18; page 67, lines 3-8].

Mr. Weinstein was present at the hearing. He explained to e Court the circumstances under which he had been approached to assume e burden of representing the Plaintiffs in the Perovich actions. He stated

whether the court would grant him sufficient time to complete the trial brief. R. T. 1/17/67, page 6, line 22, to page 7, line 1; page 7, lines 5-15; age 11, line 24, to page 12, line 3].

Judge Pence responded by indicating that he was seriously hinking about dismissing the Perovich actions for failure of the Plaintiffs o meet the January 13 deadline, and the Defendants accordingly moved for ismissal. [R. T. 1/17/67, page 12, line 4, to page 18, line 12].

A day-long hearing ensued, at which Mr. Weinstein, who had irst heard of the cases only a week earlier and was still not counsel of ecord, undertook to demonstrate to the Court why the cases should not be ismissed. Both John Joseph Hall, Esq., Les J. Weinstein, Esq., and Batris W. Perovich testified at length. The circumstances of Perovich's ischarge of Hall and of his efforts to secure new counsel were revealed in etail. [R. T. 1/17/67, page 67, line 3, to page 172, line 13].

At the conclusion of the hearing, Judge Pence made the ollowing statement:

"This morning when I came here I was--and from the affidavits, it was uncertain as to whether or not this [the discharge of Plaintiffs' attorney] was a ploy on the part of the plaintiffs to get more time. The evidence has convinced me that it was not such a ploy. It convinced me that Mr. Perovich is probably a much better pipeline man than he is a lawyer. I hope so, because the action he took was--to characterize it--it was done in haste, and done in anger. It was nearly disastrous. I say nearly disastrous, because the actions taken by Mr. Perovich, according to the testimony, and I am satisfied they were, indicate that he all of a sudden realized the problems that he

and with all of the means at his disposal to obtain new counsel. It was only finally that he was successful.

I am satisfied that he [Perovich] did try to get Mr. Hall to come back at a time when, if Mr. Hall had come, it would have meant only a slight delay. I cannot blame Mr. Hall for refusing. Once you have been dismissed as that, all of the fight and all of the interest in the case goes out, as I am sure it did with Mr. Hall, even though the two still remain frieds. I am satisfied from the evidence that the plaintiff Perovich and through him Davin did not take this action of dismissal in any way to order [sic] the disposition of the case, but rather from what amounted to a sudden hasty decision based upon irritation, not upon reason. Too much time has been invested by the plaintiff, too much time and money has been invested by the plaintiff, and too much time has been invested by the court under the circumstances as they now appear for the court to merit the court to dismiss the case."

[R.T. 1/17/67, page 173, line 1, to page 174, line 6; emphasis added].

Nonetheless, despite its conclusion that Perovich's discharge of Hall was not "a ploy . . . to get more time", Judge Pence thereafter stated that he would in the future impose sanctions upon the Plaintiffs[8] for the "enormous amount of time, trouble and effort"

[8] No effort to distinguish between or among the three Plaintiffs was made, even though Inplace Linings, Inc. had done nothing whatever to delay proceedings.

The amount of the sanctions was not set at the time. Judge Pence ordered the parties to attempt to agree upon a figure. In the event that they were unable to do so:

". . . at a subsequent hearing I will determine how much the plaintiff will pay to the defendants for the trouble which he has caused the defendants' counsel, the time spent, the effort spent by defendants' counsel as a result of the hasty actions of the plaintiffs."

[R. T. 1/17/67, page 174, lines 20-24].

The next issue to be considered was the new filing date for the trial brief. The prior filing dates had been tied to a trial date of February 13, 1967. That date, Judge Pence recognized, was lost.

"I cannot and will not at this time schedule a trial date. Now, that will come later on this Spring. The reason being that all of a sudden I have commitments all based upon the fact that this case would be completely out of the way certainly not later than March. Now that date is gone. It is impossible. We will have to reschedule after the trial brief is prepared, after the motions are prepared, and argued and heard, and a decision is made. Some time about that time we will then decide when we will go to

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The "enormous amount of time, trouble and effort" to which Judge Pence referred in these antitrust cases, which had been pending for nearly four years and in which a record of thousands of pages had been amassed, consisted, in large measure, of defendants' counsel's preparation for--including conferences among themselves--and attendance at two pretrial hearings: that on December 30, 1966, in which Judge Pence gave the Plaintiffs two weeks in which to retain new counsel and have the new counsel file a trial brief that was tantamount to being prepared for trial; and that on January 17, 1967, at which they moved to dismiss the cases. [C. T. 3606-3627].

I don't know."

[R. T. 1/17/67, page 175, line 16, to page 176, line 2; emphasis added].

The hearing was continued to the following day. Judge Pence indicated that he was assuming that Mr. Hall, "who apparently is well versed in the case--he should be, it has been giving him nightmares for months--and seven days a week of them", would assist Mr. Weinstein in the preparation of the trial brief. [R. T. 1/17/67, page 175, lines 7-12].

The parties accordingly appeared before Judge Pence on January 18, 1967. At that time, Mr. Weinstein informed the Court that Mr. Hall would not give him any assistance at all beyond answering brief inquiries as to the location of certain documents:

"MR. WEINSTEIN: Your Honor, after the close of yesterday's hearing I did two things: I contacted Mr. Hall to make certain that he and I understood what he meant by 'rendering cooperation'. He informed me that he had in his mind the same kind of cooperation that Mr. Barger [the attorney whom Hall succeeded] had given him when he no longer was attorney in the case, namely, that he would meet with me if necessary to explain briefly what the files were, point out which folders had what in them, and would be prepared to answer any short questions I had on the telephone, whereby he might answer in a few seconds what might take me hours to find.

I said I wanted to know very specifically whether or not he was prepared, for compensation or otherwise, to participate to the extent of actually assisting me in

gathering the data and the information in order to write a brief.

He said, No, that was not what he intended.

I told him I was specifically asking him because I envisioned this problem would come up.

* * *

"Frankly, he wants nothing to do with the case, but he feels an obligation to Mr. Perovich, he will not refuse my telephone calls, if I ask which file the complaint is in and which depositions are important, he will tell me those matters."

[R.T. 1/18/67, page 4, line 7, to page 5, line 1; page 9, lines 10-14].

Mr. Weinstein also informed the Court that a prior estimate that he would require from 60 to 90 days to complete the trial brief had been based upon less than full appreciation of the extent and nature of the project:

"I read last night pretrial order No. 4, which I never had occasion to read before, and learned something I did not know, even when I made my 60-to-90 days estimate, and that is that preparing a trial brief in this proceeding is an important and difficult task; if you make a mistake in it it may well be fatal in the case. The day you start to draft the trial brief, in my opinion after reading pretrial order No. 4, you must then almost be in a position to try the case, you must be ready to point out specifics, to know which witness would testify to which fact, you have to have all your law, be prepared to report on what facts will be brought out at the trial and to delineate the issues--really, to prepare for trial--with some

other intermediate steps to take place between them.

" I considered the matter and I told counsel this morning that I thought a bare minimum was 90 days, that although I do not wish to be bartering or blackmailing, I did not think it could be done in less, . . . I did not think that was possible.

* * *

"My proposal boils down to approximately a foot a week, when we talk in terms of 90 days, and 10 feet [the height to which he claimed that the portion of the record in his possession stacked]. I don't think I am being unreasonable. I use it as a shorthand expression, but merely to call to the Court's attention the truly enormous task that is before me." [R.T. 1/18/67, page 5, line 2, to page 6, line 25].

Judge Pence told Mr. Weinstein that he would give him until April 1, at 4:30 o'clock P.M. in which to file the trial brief:

". . .If you want to undertake it in that length of time, it's yours. If you say you can't do it in that period it is not yours." [R.T. 1/18/67, page 9, lines 21-24].[10]

Ultimately, the deadline was extended until April 4, at noon, and Mr. Weinstein accepted. The court's order was incorporated into Pretrial Order No. 6. [R.T. 1/18/67 page 11, lines 5-7].

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[10] Judge Pence did not specify what would happen if Mr. Weinstein refused, but in view of the fact that Mr. Weinstein was the only attorney that Perovich and Davin had been able to find willing to take the cases in nearly a month of searching in California, Texas and Washington, the possibility of a dismissal by default was evident, if not preordained.

Thereafter, pursuant to the oral order of Judge Pence imposing sanctions, counsel for the various defendants submitted unsworn statements of their expenses. [C. T. 3602; 3606; 3623]. That from United's counsel consisted of a letter to Les J. Weinstein, Esq., describing the work done for which they were seeking compensation and concluding with a total charge for professional services rendered of $972.10. (It also sought compensation for disbursements of $11..82, plus an unspecified amount for part of the cost of a reporter's transcript of the "December [sic January, 1967] 17 and 18, 1966 hearing.") [C. T. 3616 to 3619].

Plaintiffs objected to the order imposing sanctions which the Defendants prepared on the grounds, inter alia, that the sanctions sought by the Defendants included charges for time spent after January 17, 1967, the date on which the Court ordered the imposition of sanctions, and time spent by various counsel for the Defendants in conferring with each other about the award of sanctions; that there was no effort to apportion the sanctions as between the various actions, even though Inplace Linings, Inc. had done nothing whatever which resulted in failure to comply with any court order; and that "[n]o evidence has been introduced and no affidavit has been filed with the court by any of the attorneys for the defendants substantiating any of the alleged charges allegedly incurred. . ." [C. T. page 3628 to page 3631].

Despite Plaintiffs' opposition, an Order Imposing Sanctions was entered awarding the Defendants, and each of them, the full amount that they claimed. [C. T. 3745]. It provided that "Plaintiffs, severally or jointly, shall compensate defendants, through their attorneys, a total of $4,945.25. . ." [C. T. 3746, lines 30-31; emphasis added].[11]

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[11] Thus if the sanctions were not paid, Inplace Linings, Inc., whose counsel had withdrawn through no fault of its own, would suffer the same penalty as the "guilty" Plaintiffs.

While the sanctions point was being fought, Plaintiffs were busy on another front. On March 14 and 17, respectively, Plaintiffs filed documents aggregating in excess of 100 pages in which they moved:

1. To extend the time for filing the trial brief;

2. To file amended complaints in Nos. 63-278 and 63-321.

15 U.S.C. §1 of the Sherman Act concerns contracts, combinations and conspiracies in restraint of trade, while §2 concerns monopolization, attempt to monopolize, and conspiracy to monopolize. The First Amended Complaints were predicated on 15 U.S.C. §1, et. seq., and the proposed Second Amended Complaints did not seek to alter the basic facts upon which Plaintiffs' claims were predicated but only, according to Plaintiffs' moving papers, to "more clearly set up the Plaintiffs' claim under §2 of the Sherman Act. . ." [C.T. page 3721, lines 16-17], particularly attempted monopolization.[12]

3. To vacate or modify a protective order issued by Judge Pence which precluded either Perovich or Davin from access to approximately 90,000 documents, many of them in technical pipe industry jargon, which had been produced by the various Defendants.

4. To reconsider and/or clarify certain discovery rulings so as to require Defendants to respond to a group of interrogatories that Plaintiffs had theretofore propounded and which were "directed at antitrust violations in the sale and manufacture of concrete pipe.

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[12]The Second Amended Complaint also contained certain other changes from the FirstAmended Complaint, but at oral argument Plaintiffs' counsel made it clear that he was principally concerned with attempted monopolization and was willing to forego all other material changes. [R.T. 4/6/67, page 66, line 23, to page 70, line 1]. As Mr. Weinstein stated: "I just want to be able to present a unilateral attempt to drive my client out of business, and driven out they were." [R.T. 4/6/67, page 60, lines 19-21].

"without requiring plaintiffs to first establish a direct link between said conspiracy [in the sale and manufacture of concrete pipe] and the business of inplace lining and rehabilitation of steel pipe." [C. T. 3739, line 32, to page 3740, line 4].

Affidavits in these documents allege, inter alia, the following:

(1) That since January 10 Plaintiffs' counsel had devoted a substantial amount of time, including many evenings and weekends, to work on the Perovich cases. [C. T. 3644, lines 19-30; page 3649, lines 13-29].

(2) That "counsel for the plaintiffs must become familiar with and understand prior to being able to properly write a trial brief" certain documents produced by Defendants and located in a repository at the offices of Gibson, Dunn & Crutcher - - the total number of documents in the depository was estimated at 90,000 - - and that Plaintiffs' counsel were unable to properly understand the documents because they were couched in "trade terminology, abbreviations and other terms of art" unintelligible to the plaintiffs' attorneys. [C. T. page 3645, lines 14-15; page 3700, line 26, to page 3701, line 15; page 3714, lines 15-26; page 3718, line 11, to page 3719, line 6; page 3711, line 21 to page 3712, line 14].

(3) That the files in the possession of Plaintiffs' then counsel were incomplete and, indeed, that even the three Amended

Complaints which were filed in the respective cases were not in their possession. [C.T. page 3645, line 26, to page 3646, line 11].

The substance of Plaintiffs' position was that the granting of these motions was necessary in order to permit Plaintiffs to prepare an adequate trial brief and then prosecute the actions to completion. [C.T. page 3637, line 19, to page 3640, line 1].

A hearing on the motion to extend the time to file the trial brief, but not on the other motions, was held on March 18, 1967. At that time, Mr. Weinstein explained that his acceptance of the April 4 date was based upon an erroneous estimate of the time that would be required, motivated by a desire to help his clients:

> "I made some promises, but frankly I should have known I couldn't have kept them, and frankly was motivated to take the cases because of Mr. Perovich who couldn't find another counsel.
>
> * * *
>
> "I made some optimistic estimates. At that time I tried to make a quick determination as to what preliminary matters might be involved, but I made a very bad guess, and I acceded to your Honor's suggestion that I could not have beyond April 4th." [R.T. 3/18/67, page 17, line 25, to page 18, line 11].

Mr. Weinstein pointed out that once he actually began delving into the case he discovered that his files were incomplete and would have to be

reconstructed and that the 90,000 documents which had been produced by the various Defendants and which would have to be reviewed in connection with the preparation of the trial brief were written in a highly technical terminology which, although he held an engineering degree and was licensed to practice before the Patent Office, rendered them unintelligible to him. [R.T. 3/18/67, page 18, line 15, to page 21, line 23; C.T. page 3644, line 19 to page 3646, line 11]. Yet under the protective order issued by the Court, he believed he was precluded from even discussing the documents with his clients, Davin or Perovich, the only two persons available to him who would be in a position to assist him in interpreting them. [C.T. 3752, lines 24-32].[13]

Judge Pence acknowledged that if the Plaintiffs' motions for leave to file amended complaints, modification of the protective order barring Perovich and Davin from the documents which the Defendants had produced, and additional discovery, were granted, it would require

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13 While Judge Pence disagreed with Mr. Weinstein's interpretation of the relevant portion of the order [R.T. 3/18/67, page 70, lines 2-25], this is what the Court's Order said:

"6. Under no circumstances shall Batris W. Perovich, Charles O. Davin or any other employee or officer of any plaintiff be permitted access to the depository or to any of the defendants' protected documents, or microfilms or copies thereof maintained in the depository without an express order of this Court authorizing such inspection. Furthermore, neither plaintiffs' counsel nor any authorized representative who procures copies of selected documents in the depository shall suffer or permit disclosure of such copies to Batris W. Perovich, Charles O. Davin, or any other employee or officer of any plaintiff without an express order of this Court permitting such disclosure.

"7. All persons who inspect any of the defendants' protected documents, or any microfilms or copies thereof are hereby enjoined and restrained from suffering or permitting disclosure of any of the documents, microfilms or copies thereof to any person not authorized by this Order to inspect the documents." [C.T. 3593, line 19, to page 3594, line 2].

that the Court extend the time within which the Plaintiffs were required to file their trial brief. [R.T. 3/18/67, page 77, lines 17-21].[14] For that reason, Judge Pence, at the conclusion of the hearing on March 18, extended the deadline for the pretrial briefs to April 27, 1967, in order to permit him to rule on the foregoing motions; the extension was incorporated into Pretrial Order No. 7. He indicated, however, that his disposition was clearly against granting them.

> "I will say very frankly that unless something new and different and much more cogent than has ever been presented is presented in support of these motions, that the Court will very probably not grant any of these motions. The situation here may be described, Mr. Weinstein, as heretofore done, that you have two strikes on you with Kofax [sic] delivering the third ball. You may be able to hit it, but you may strike out, but you have two strikes on you. I want to make that very clear." [R.T. 3/18/67, page 79, line 18, to page 80, line 21].

Judge Pence's message, delivered in baseball terminology, was indeed clear, and in light of it Mr. Weinstein immediately undertook to

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[14] Specifically, Judge Pence stated: "The Court, unless it were to summarily dismiss the motions without hearing, could not properly say that you should have the brief in by April 4th when the hearing is not until the 8th, and if it granted any of your motions, perforce that would change the total - -"
[R.T. 3/18/67, page 77, lines 17-21; emphasis added].

settle the cases, and ultimately succeeded in settling Plaintiffs' claims against every Defendant except United, resulting in the complete disposition of No. 63-321, and the elimination of all but one Defendant, United, in No. 63-278 and No. 63-279. [C.T. 3873, 3890, 3910, 3939].

The motions to file an amended complaint, for modification of the protective order, and for reconsideration and/or clarification of certain discovery orders came on for hearing on April 6, 1967.

United's opposition to these motions was based to a considerable extent upon unsworn statements of United's counsel, most of them oral, so that Plaintiffs' counsel did not even have notice of all of the contentions he would have to meet. [See, e.g. 4/6/67, page 32, line 13, to page 33, line 1, page 35, line 20, to page 36, line 15].

When Mr. Weinstein objected to such procedure, Judge Pence replied:

> "THE COURT: Now, now, counsel. I don't take this lack of affidavits nearly as seriously as you do . . . I judge each man that appears before me based upon his own attitude and my judgment of him, and I don't rate them all the same."
> [R.T. 4/6/67 (afternoon session) page 33, lines 5-10].

Each of the motions[15] was denied.[16] [R.T. 4/6/67, page 65,

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[15] The Court never formally ruled on the motion to file amended complaints. Appellant believes, however, that under the circumstances such failure to rule was tantamount to denial; and even if this Court does not feel that there is a ruling of the District Court to be reviewed, it can at least indicate to the District Court what it believes to be the proper disposition of the motion.

[16] Judge Pence had previously referred to accusations that he was a "liberal liberal" with regard to the amendment of pleadings. [R.T. 10/3/66, page 23, line 25, to page 24, line 9].

lines 10-16; (afternoon session) page 11, lines 10-13; (afternoon session) page 49, lines 10-16].

Pursuant to the court's order imposing sanctions, the payment of sanctions to United was due at 4:30 o'clock P. M. on that date, April 6. When Plaintiff's counsel indicated some uncertainty as to whether or not the sanctions would be paid, the court stated:

> "THE COURT: I will give your lone victory of the day, which usually is contrary. Ordinarily, it is the defendants who cry in their beer after they leave the courtroom. 'Well, we didn't get a single hit today.' I have heard that many times.
>
> I will give you your lone hit today. If you want another 24 hours, I will give it to you so that you have another 24 hours to decide what you want to do regarding the sanction."
>
> [R. T. 4/6/67 (afternoon session) page 50, lines 9-16].

On April 11, 1967, Plaintiffs filed a "Notice of Refusal to PaySanctions" in which they stated as their reasons for refusing to pay sanctions the following:

> "1. The order requiring the plaintiffs to pay sanctions exceeded the power of the Court;
>
> "2. The plaintiffs were financially unable to pay sanctions within the time ordered;[17]

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[17] Batris W. Perovich has stated before this Court in a document which is outside the record on appeal herein that funds to pay sanctions were available to Plaintiff's counsel on April 7, 1967; that Perovich urged his counsel to pay such sanctions, but that his counsel refused to do so. (Appellant's Reply to Counsel's Opposition to Appellant's Original Petition, Page 3). Perovich's counsel, circumscribed as they are by the Canons of Ethics governing an attorney's relations to his clients, can only point out that this representation is contrary to the record on which this case is being appealed.

"3. The orders of the Court setting the time for preparation of trial briefs, denying the plaintiffs personal access to the documents produced by the defendants, and limiting discovery into evidence of conspiracy as it affected the current pipe industry so hampered the preparation of the Plaintiffs for trial that it would have been a futile effort to pay said sanctions in order to avoid dismissal." [R.T. page 3877, lines 1-10].

Thereafter, on April 25, 1967, Plaintiffs filed "Plaintiffs' Memorandum Re Payment of Sanctions and Filing of Trial Brief" in which they stated that they now had sufficient funds generated from the settlement of claims against other Defendants in the action to pay the sanctions which were now due to United, and requested leave of the court to pay them:[18]

"The plaintiffs now have the funds with which to pay . . . sanctions and hereby offer to pay them in the event that the Court will permit them to now be paid even though the deadline of April 7 has passed." [C.T. 3934, lines 13-15].

In the same Memorandum Plaintiffs stated that because of the reduction in their burden due to the settlement of the claims against the other Defendants, they felt that it would be possible for them to complete preparation of the trial brief on or before June 15, and requested that the court grant them leave to do so:

"As the court knows, plaintiffs' new attorneys and present attorneys have contended that that task constituted an insuperable burden for numerous reasons which will not again be restated here.

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[18]When American Vitrified Products, Inc. was dismissed, the sanctions were reduced by one-third from $984.72 to $656.15; and when No. 63-321 was dismissed, the figure again reduced, this time to $328.08. [C.T. 3901-3902].

However, by reason of the dismissal of the three cases against all defendants except United, and by reason of the pending settlement between the plaintiff Inplace Linings and United, plaintiffs' attorneys believe that the concomitant reduction in the burden of the preparation of a trial brief is such that they can file the required trial brief by June 15, 1967. The remaining plaintiffs request that the court authorize and permit the plaintiffs to file their trial brief on or before June 15, 1967 and not to dismiss this action by reason of the plaintiffs' prior failure to comply with the Court's order regarding the payment of sanctions or their inability to file a trial brief by April 27, 1967.

Although there has been a genuine disagreement between the court and plaintiffs' counsel regarding the necessity for this time, it is submitted that the present posture of this litigation is such that no harm whatever will flow to the defendant United if the Court permits the remaining plaintiffs to proceed with its case so that United can test, on the much heralded motion for summary judgment, its theory that there isn't any possibility of there being a case against it."

[C.T. 3935, line 19, to page 3936, line 9].

On May 22, 1967, Judge Pence entered an "Order of Dismissal" [C.T. 3954], which was followed by a "Memorandum and Order of Dismissal" [C.T. 3957-3974], dismissing Plaintiffs' actions.

Thus none of the Perovich actions have ever gone to trial. After they had been pending for more than four years, after Perovich had incurred well over $100,000.00 in legal expenses in prosecuting the two actions in which he was interested; after extensive discovery had taken place, including many depositions [R.T. 3/18/67, page 71, lines 18-20],

and when they were on the verge of trial, the Perovich actions were dismissed for failure of the Plaintiffs to file a "trial brief" on the date ordered by the District Court, and failure of the Plaintiffs to pay sanctions of $328.08 to United.[19]

A Notice of Appeal was timely filed. [C.T. 3988-3989].[20]

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[19]The dismissal was as to the action below from which the instant appeal is taken and No. 63-279, the two actions in which Perovich was interested. The third action, Inplace Linings, Inc. v. Pipe Linings, Inc., et al, No. 63-321, had previously been dismissed by stipulation of the parties. [C.T. 3873; C.T. 3899; C.T. 3939].

[20]While Notice of Appeal was filed from the dismissal of both Perovich v. Pipe Linings, Inc., et al, No. 63-278, and Northwest Pipe Linings, Inc. v. Pipe Linings, No. 63-279, the latter appeal has since been abandoned.

ARGUMENT

A. AN EXAMINATION OF THE RECORD ON APPEAL MAKES IT APPARENT THAT THE ACTION BELOW HAS BEEN PROSECUTED WITH DILIGENCE. THE ONLY ACTION OF THE PLAINTIFFS WHICH ARGUABLY DELAYED PROSECUTION WAS PEROVICH'S DISCHARGE OF HIS ATTORNEY ON DECEMBER 14, 1966. BUT THE DISCHARGE WAS NOT FOR THE PURPOSE OF DELAYING PROCEEDINGS, BUT RATHER STEMMED FROM A DESIRE TO ACCELERATE THEM, AND THE DISTRICT COURT ACKNOWLEDGED THAT IT DID NOT JUSTIFY DISMISSAL.

Appellant is cognizant of the burden which a plaintiff assumes in attempting to persuade an appellate court that the trial court erred in dismissing his action for lack of diligent prosecution or failure to comply with court order. As Judge Pence points out in his "Memorandum and Order of Dismissal," dismissal on these grounds "rests within the discretion of this [the District] Court . . ." [C.T. 3969, lines 6-7].

Nonetheless, the extreme gravity of such a dismissal -- the deliberate aborting of a claim for relief by the institution established to grant the relief -- makes it imperative that the appellate court carefully review the action of the district court to determine if its discretion has been abused; and there are a host of cases in which abuse has been found to be present.

Jefferson v. Stockholders Pub. Co., 194 F. 2nd 281, 282 (9th Cir. 1952)

Meeker v. Rizley, 324 F. 2nd 269, 271 (10th Cir. 1963)

Stanley v. Alcock, 310 F. 2nd 17, 20 (5th Cir. 1962)

Red Warrior Coal & Mining Company v. Baron, 194 F. 2nd, 578, 580 (3rd Cir. 1952)

In determining whether a particular dismissal was proper, the appellate court must take into account that dismissal with prejudice is a harsh, indeed the ultimate, sanction which a court can impose upon a litigant. It militates against the fundamental policy of Anglo-American -- and, indeed, all enlightened systems of -- jurisprudence, that cases should be disposed of upon their merits. As stated in Davis v. Operation Amigo, Inc., 378 F. 2d 101 (10th Cir. 1967):

> "A dismissal, with prejudice, is a harsh sanction and should be resorted to only in extreme cases. . . . The judge must be ever mindful that the policy of the law favors the hearing of a litigant's claim upon the merits." [378 F.2d at 103].

Accord:

Bon Air Hotel Inc. v. Time, Inc., 376 F. 2d 118, 121 122, (5th Cir. 1967).

Independent Productions Corp. v. Loew's, Inc., 283 F.2d 730, 733, (2nd Cir. 1960).

Syracuse Broadcasting Corp. v. Newhouse, 271 F.2d 910, 914 (2nd Cir. 1959)

Hence the District Court should exercise forbearance, and dismiss only when a plaintiff's actions are so disruptive as to cause the need for the orderly administration of justice to outweigh the goal of affording the litigant his day in court and resolving his case on its merits.

Such forbearance, Appellant submits, should, for a variety of reasons, be particularly great with respect to the plaintiff in an antitrust action. For one thing, it is the policy of Congress to favor and encourage private antitrust actions. As stated by the United States Supreme Court with reference to the enactment of Section 5 of the Clayton Act [providing that a final judgment in a government antitrust prosecution is prima facie evidence of an antitrust violation in a private antitrust action], "Congress itself has placed the private antitrust litigant in a most favorable position . . ." [Radovich v. National Football League, 352 U.S. 445, 454 (1957).] The reason for this

olicy is that the antitrust plaintiff is not merely redressing a private wrong; ather, he is relieving the government of a portion of the burden of combating ommercial conduct inimical to the social welfare:

"It was originally hoped that this [the treble damage provision of the antitrust law] would encourage private litigants to bear a considerable amount of the burden and expense of enforcement and thus save the government time and money."

Committee on the Judiciary Senate Report No. 619, 84 Cong. First Ses. (1955)

he importance of the private antitrust litigant as an instrument for carrying ut governmental policy has been recognized by this Court.

Karseal Corporation v. Richfield Oil Corporation, 221 F. 2d, 358, 365 (9th Cir. 1955)

Mach-Tronics, Incorporated v. Zirpoli, 316 F. 2d 820, 828 (9th Cir. 1963)

Secondly, the burdens under which an antitrust plaintiff commonly unctions -- particularly when he does not have the benefit of Section 5 of the layton Act -- are immense. The disparity in economic resources as between the laintiff and the defendants whom he is challenging is frequently considerable, ffording the defendants a significant strategic advantage. In addition to ack of sufficient financial resources, the antitrust plaintiff commonly has ormidable problems of proof stemming both from the complex nature of the ases and the simple fact that usually most of the evidence is in the possession f the defendants. The antitrust plaintiff who manages to overcome these bstacles and carry his case through trial is a doughty fellow indeed.

Obviously, justice must be administered in an orderly fashion, and

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1 Indeed, the socially useful role which an antitrust litigant can play could hardly be better exemplified than by Perovich himself. It was as a consequence of his action --"the man who blew the whistle"--that a vast conspiracy in the steel and concrete pipe industries was revealed and presumably, broken up.

gardless of the nature of his claim. But, Appellant submits, the govern-
ental policy favoring private antitrust suits and the peculiar difficulties
ich an antitrust plaintiff encounters are factors which a district court must
ke into account in exercising its discretion.

Other such factors include prominently the motives from which the
ck of diligent prosecution or noncompliance with court orders arose,[22]

In most of the cases which the District Court cites in justification of the dismissal the noncompliance stemmed from a deliberate desire to delay proceedings or to disobey the Court's orders, either on the part of the plaintiff or his attorney.

In Link v. Wabash Railroad Company, 370 U. S. 626 (1962) the Supreme Court justified the decision of the Court of Appeal in affirming the dismissal of the action by pointing out that "it could reasonably be inferred from his absence [at a pretrial conference], as well as from the drawn out history of the litigation. . . that petitioner has been deliberately proceeding in dilatory fashion." (370 U. S. 633). There was a dissenting opinion by Justice Black, concurred in by Chief Justice Warren [Justice Douglas also dissented and two other Justices took no part in the decision of the case], in which the decision of the District Court was held erroneous because, in fact, it had not "relied on all the circumstances of this case, including 'earlier delays' to justify its dismissal with prejudice" (370 U. S. 638).

In Janousek v. Wells, 303 F. 2d 118 (8th Cir. 1962), the Court of Appeal found from the record that the plaintiffs "impeded the progress of the litigation by every obstacle and maneuver which their ingenuity could command." (303 F. 2d 122).

In Deep South Oil Co. of Texas v. Metropolitan Life Ins. Co. 310 F. 2d 938 (5th Cir. 1962) there was a long history, extending over several years, of disregard for the Court's orders.

In Edmond v. Moore - McCormack Lines, 253 F. 2d 143 (2nd Cir. 1953) the plaintiff had changed counsel nine times during the course of the litigation and failed to appear on the morning of the trial. The judge continued the trial to the afternoon and ordered the plaintiff to appear or to provide a doctor's certificate that he was too ill to attend. He did neither and the case was dismissed. The Court of Appeal affirmed the dismissal stating ". . . the judge in ordering the dismissal might reasonably have concluded that the plaintiff's default of appearance was not caused by illness but was an unduly belated maneuver to obtain yet another postponement." (253 F. 2d 144).

In Slumbertogs, Inc., v. Jiggs, Inc. 353 F. 2d 720 (2nd Cir. 1965) cert. den. 383 U. S. 696, the facts of the case are not set forth in the opinion, but the Court of Appeals referred to the "Dilatory and contumacious conduct of plaintiffs and their counsel in virtual defiance of the rules and orders of at least six judges of the district court. . ." (353 F. 2d 720).

prejudice to the defendant,[23] and whether there are extenuating circumstances such as difficulties encountered by the plaintiff's attorney and the need for new personnel to familiarize themselves with the issues of the case.[24]

Appellant respectfully submits that an examination of all of the facts and circumstances surrounding the dismissal of the action below reveals that dismissal was unwarranted, arbitrary, unjust and an abuse of the District Court's discretion.

The action below was commenced in March of 1963. The incident which precipitated the events that ultimately led to dismissal was Perovich's discharge of his exhausted then attorney, John Joseph Hall, Esq., on December 14, 1966. There is nothing whatever to indicate that

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[23] True, the absence of a direct showing of prejudice to the defendant from delay will not, in itself, require reversal of an order of dismissal since prejudice will be "presumed" from the fact of delay. Pearson v. Dennison, 353 F. 2d 24, 28-29 (9th Cir. 1965). Nevertheless, prejudice to the defendant is obviously a relevant consideration. Wholesale Supply Co. v. South Chester Tube Corp., 20 F. R. D. 310, 313 (E. D. Pa. 1957). In Livingstone v. Hobby, 127 F. Supp. 463, 464 (E. D. Pa. 1954), the Court held that an unexcused seven-month delay in delivering the summons and complaint to the marshal for service did not warrant dismissal for lack of diligent prosecution when the defendant was not prejudiced from the delay.

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[24] As stated in Stanley v. Alcock, 310 F. 2d 17 (5th Cir. 1962), "It is clear that a new Trustee [appointed upon prior Trustee's death] would have a reasonable time after appointment and substitution to acquaint himself with the issues of the case and that it ought not to be dismissed without taking that situation into account. The final judgment entered by the court below on September 16, 1960 recites various acts which were done between February 29, 1960 and the date of such entry. Plaintiff's attorney was, during that entire period, beset by many difficulties in producing his proof, most of which had to be obtained from his adversaries. This fact, plus the change of trustees, furnished extenuating circumstances which lead us to the conclusion that the court below ought not to have exercised its discretion so as to dismiss the action for want of prosecution. (310 F. 2d 20; emphasis added.)

during the intervening period the Perovich actions were prosecuted with lack of diligence. Indeed, precisely the contrary is true. Extensive discovery was taken, a record consisting of thousands of pages amassed.[25] Plaintiffs' counsel, John Joseph Hall, Esq.,[26] a sole practitioner, was "working a seven-day week" on the Perovich cases since August of 1966. [R.T. 1/17/67, page 73, lines 5-15], and was exhausted. [R.T. 1/17/67, page 76, lines 3-8]. Judge Pence felt that Mr. Hall "was pacing himself too hard" and warned him, "John, for heaven's sake, give yourself enough time . . . You'll kill yourself [from overwork]." [R.T. 3/18/67, page 17, lines 1-12]. Perhaps most important of all, by December of 1966 the Perovich actions were nearly ready for trial.

In short, it is clear beyond peradventure that there is nothing in the conduct of either Perovich or his counsel for the period prior to December 14, 1966, that would even remotely justify dismissal; and that, in fact, the actions were prosecuted with salutory vigor.[27] Thus, if the dismissal is to be upheld, it must be because of events occurring on and after December 14, 1966.

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[25] The size of the record in itself is eloquent testimony to the intensity of the battle, and certainly raises an inference of diligence on the part of Appellant.

[26] The record indicates that Perovich was dissatisfied with and ultimately discharged his first counsel, Richards D. Barger, Esq., because he was too lenient in giving continuances to the Defendants. [R.T. 1/17/67, page 105, lines 3-8.]

[27] Judge Pence's "Memorandum and Order of Dismissal" refers critically to the eight to nine months hiatus in discovery which occurred when Hall made a "gracious side-step" [C.T. 3961, line 29] and gave up Plaintiffs' trial priority so that certain other western pipe cases could be tried. But the hiatus in discovery was imposed by order of Judge Pence for the benefit of Defendants and over Mr. Hall's objections. [C.T. 2206-2211; 3962, lines 5-12.]

The event which stands as the root cause of the Court's displeasure s obviously Perovich's discharge of John Joseph Hall, Esq., and Mr. Hall's ubsequent withdrawal from the representation of Inplace Linings, Inc.[28] R. T. 3/18/68, page 73, lines 15-19.]

Appellant does not comment upon the wisdom of such a step. That t delayed the trial of the Perovich actions is perhaps a permissible, hough not inescapable, inference. It is not at all certain that Hall would ave been able to complete the trial brief in sufficient time to permit the ase to be tried on February 13, 1967; and unless this date was met, other ommitments would likely have prevented Judge Pence from trying the ctions for a considerable time thereafter. [R. T. 1/17/67, page 175, line 8, to page 176, line 2.]

It is important to note, however, that Perovich discharged Hall, ot from a desire to delay the trial, but, rather from a zeal to accelerate he prosecution of the case and meet the February 13th trial date. Once he emotional spasm in which he had acted passed and he came to appreciate he consequences of his action, he attempted to remedy whatever disruption t might have caused. On December 16th, just two days after the discharge, e asked Mr. Hall to come back into the cases. Mr. Hall refused. [R. T. /17/67, page 151, line 17, to page 152, line 16.] Several weeks later, when is multi-state sojourn to find other counsel was proving fruitless, he sked Mr. Hall to finish the trial brief. Again Mr. Hall refused.[29] [R. T.

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8 This was a case in which Judge Pence punished Davin for the "sins" of Perovich.

9 Mr. Hall's attitude is not surprising. As Judge Pence said, the Perovich actions had been "giving him nightmares for months - and seven days a week of them . . ." [R. T. 1/17/67, page 175, lines 9-11.] Undoubtedly, it would have been difficult for a large firm, much less a sole practicioner, to comply with the pretrial schedule which the District Court imposed.

/17/67, page 151, lines 4-16.] He did, in other words, everything he could lo to ameliorate the situation he had created. As Judge Pence himself found, he discharge was not a "ploy on the part of the plaintiffs to get more time " R.T. 1/17/67, page 173, lines 1-5], and the District Court did not feel -- it least at the time -- that Perovich's discharge of Hall warranted mposition of the sanction of dismissal.

If Perovich's discharge of his attorney did not warrant dismissal vhat did?

In its "Memorandum and Order of Dismissal" the District Court efers to four or five postponements of the date for filing the trial brief, mplying that the Court had extended Appellant great indulgence but that Appellant treated the Court like "a race track", and the Court decided he iad "fouled once too often". [C.T. 3792, lines 21-23]. The facts, Appellant ubmits, are to the contrary. It would be a more apt metaphor to describe Appellant as a struggling swimmer who was thrown a number of lines, each a few feet short.

The due date was originally set in Pretrial Order No. 4 for December 5, 1966. Mr. Hall never accepted this deadline and Judge Pence himself made it clear that he would not hold Hall to it but, indeed, encouraged him o take more time. [R.T. 1/17/67, page 71, lines 14-19.]

The next due date, contained in Pretrial Order No. 5, was January 3, 1967. It was set on December 30, 1966, after Hall had been discharged ind while Perovich was attempting to secure, but had not yet succeeded in ecuring new counsel. Its effect was to give whatever counsel Perovich night retain (assuming that counsel was retained immediately) two weeks n which to, in effect, become prepared to try three complex antitrust ases, each dealing with a different geographical area, involving inter alia, ndercost job bidding and a market allocation conspiracy, which had been

pending for four years and in which a very large record had accumulated Could any attorney have reasonably been expected to comply with such a deadline?[30]

The due date for the trial brief was next set in Pretrial Order No. 6 for April 4, 1967. The Court makes a great point of the fact that this date was accepted by plaintiff's new counsel and characterized as "more than generous." [C.T. 3967, lines 25-32]. This is, of course, true, but few indeed are the occasions in the law when a party -- and here it was not even a party but a party's counsel[31] -- is held inexorably to his word, regardless of the circumstances, and this certainly should not be one of them.

For one thing, an examination of the transcript of hearing and the record reveals some of the pressures under which Mr. Weinstein was operating. He was the only attorney, in a search that took him as far away as Texas, that Perovich was able to find willing to assume the burden of the three actions. The April 4 deadline was presented by the District Court as an ultimatum -- take it or leave it. If Mr. Weinstein did not take it, the possibility of dismissal was apparent.[32]

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30 The District Court's reference to the possibility of dismissal at the December 30th pretrial conference [R.T. 12/30/66, page 10, lines 2-9] was, to say the least, premature, and arguably reveals a disposition on the part of the Court toward the Perovich actions lacking the understanding which might have been expected.

31 This circuit has indicated that the behavior of plaintiff's attorney is not in all circumstances attributable to plaintiff for purposes of determining the propriety of dismissal. Russell, et al. v. Cunningham, et al., 279 F.2d 797, 804 (9th Cir. 1960).

32 Why Judge Pence should be concerned about the timing of a trial brief when it was tied to a trial date is understandable. Why he should have been so concerned about its timing at this particular juncture in the proceedings is not. When the February 13th date was passed, Judge Pence could not simply advance the trial date to compensate for the

Second, far more important than what Mr. Weinstein said he could do is what in fact occurred during the period between January 18th and April 4th. The Court stated in its memorandum of dismissal that Perovich's conduct subsequent to January 18 "must be viewed as devices for securing delay." [C.T. 3972, lines 5-6]. Appellant does not question the Court's sincerity in making such a statement; but, however the situation may have appeared to the Court, the charge is flatly incorrect.

On the contrary, after January 18th Plaintiff's counsel made an extreme effort to move the cases along. Though other commitments precluded Mr. Weinstein from devoting all of his time to the three Perovich actions, he devoted a very substantial portion of his time to them, including many weekends and evenings. [C.T. page 3644, lines 19-30]. More than that, he promptly secured the services of another attorney who was assigned to work full time on the Perovich actions and who, in fact, made substantial progress in analyzing the voluminous record with which he had to deal. [C.T. page 3649, lines 13 to page 3650, line 4].

Finally, and most important, it is obvious that at the time of this acceptance and counsel's polite but gratuitous characterization of the District Court's action as "more than generous", counsel did not know of a number of material factors bearing upon his ability to meet the deadline. One does not always know that a fruit is spoiled until he bites into it, and Appellant's counsel did not appreciate the difficulties of the task of preparing the trial brief until he assumed it. He made a number of unsettling

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(Continued)
additional time required to complete the trial brief because of other commitments which he had. He was not even willing to schedule the trial at all, saying it "might be in 1967. It might not be until 1968. I don't know." [R.T. 1/17/67, page 176, lines 1-2].

discoveries.

First, it was not clear from the complaints that two of the three actions (No. 63-378 and 63-321) contained claims for a violation of Section 2 of the Sherman Act [C. T. 3701, lines 16-25].[33]

Second, he discovered that the 90,000 documents that were located in a documents depository at the offices of United's counsel and that would have to be reviewed in connection with the preparation of the trial brief, because of the trade and technical terminology in which they were couched, were unintelligible to him; and the two persons available to him who had the expertise to assist him in interpreting the documents were precluded by a Court order from doing so. [C. T. 3749, line 10 to page 3753, line 5; Exhibits 1 through 5 to Affidavit of Les J. Weinstein, C. T. pages 3703-3710].

Third, he learned that there were ambiguous rulings of the District Court, never incorporated into any formal Court order, concerning discovery on matters relating to the Defendants' alleged conspiracy to fix prices, allocate territories and customers in the sale of concrete pipe, and that the Defendants took the position that they had produced everything that they were required to produce. [C. T. 3699, line 12, to page 3700, line 14].

Fourth, he discovered the sorry and incomplete state of the record that he had inherited; that the files of the three actions were in such poor condition that it was necessary forPlaintiffs' counsel to devote a substantial amount of time just to the mechanical matter of putting together a complete set of files. [C. T. 3645, line 11, to page 3646, line 11].

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33 That this discovery was not made until after January 18, 1967, is not surprising since Perovich's new counsel did not finally receive a true copy of one of the complaints until March 13, 1967. [C. T. 3646, lines 1-11].

So far as the latter problem was concerned, Plaintiffs' counsel had
al alternative except to put the files in order as expeditiously as pos-
. But the first three problems presented a serious dilemma. Two
natives were open to Plaintiffs. The first was to disregard the possible
t in the pleadings, disregard the 90,000 documents which the Defendants
produced, accept the Defendants' interpretation of certain discovery
rs even though the Plaintiffs might, in fact, be entitled to certain
ly important additional discovery, and attempt to produce within the
licable time limit a trial brief. Undoubtedly this would have been the
rse of least resistance for Plaintiffs' counsel. The obvious difficulty with
s that the trial brief would, of necessity, reflect circumstances under
ich it was written; its ability to withstand Defendants' motion for summary
lgment would be problematical and certainly it would not afford Plaintiffs the
st foundation for the trial of the action.

The second alternative was to bring these matters before the District
ourt for adjudication, even though preparation of the appropriate motions
ould require such diversion of time away from the trial brief as to preclude
ling it by April 4. It was this course which Plaintiffs chose.[34]

On March 14 and 17, respectively, Plaintiffs filed a complex of four (4)
notions, aggregating in excess of 100 pages. The first was for an extension
of time to file the trial brief "on the ground that Plaintiffs' counsel are unable
to properly prepare said briefs until certain other motions are decided, and
on the ground that Plaintiffs' counsel are unable to fully familiarize themselves

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34 The effect of requiring a plaintiff to make such a choice under penalty of dismissal if his motions should not be granted is tantamount to the court requiring a plaintiff to compromise his case, perhaps fatally, for the privilege of getting it to trial.

with all of the files, depositions and documents involved in these cases and to fully prepare pretrial briefs meeting the requirements of Pretrial Order No. 6 within the time period set in said Pretrial Order." [C.T. page 3635, lines 18-25]. The other three were as follows:

(a) a motion seeking leave to file an amended complaint in No. 63-278 and 63-321, alleging violations of Section 2 of the Sherman Act;

(b) a motion seeking clarification and/or reconsideration of the Court's order on certain discovery matters in light of the decision in Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962);

(c) a motion seeking modification of the Court's order prohibiting Charles O. Davin and Batris W. Perovich from viewing the documents on file in the document depository.

The motion for an extension of time to file the trial brief was heard on March 18, 1967, but the other motions were not scheduled to be heard until April 6, 1967, two days after the trial brief was due. Judge Pence admitted that if any of the latter motions were well taken, he would be bound to extend the due date for the trial brief. [R.T. 3/18/67, page 77, lines 17-21].

His disposition as to these motions, however, may be inferred from the following statement:

> "The situation here may be described, Mr. Weinstein, as heretofore done, that you have two strikes on you with Kofax [sic] delivering the third ball. You may be able to hit it, but you may strike out, but you have two strikes on you. I want to make that very clear." [R.T. 3/18/67, page 79, line 18 to page 80, line 2].

Since the trial brief was due before the hearing on the motions and the District Court claimed he did not want "to dismiss them [the Perovich actions]

page 78, lines 10 - 13; page 80, lines 7 - 21]. It is apparent that except for the filing of the motions, the District Court would not have granted this final extension.

This attitude of the District Court once again put Plaintiffs' counsel in a dilemma. He could have dropped everything and devoted all remaining time to the preparation of what he felt, if the motions were denied, would be an inadequate trial brief and which he might not be able to finish on time. (Moreover at least until April 6th when the motions were decided, he wouldn't know definitely what the content of the brief would be or what his factual foundation would be). Or he could devote his efforts to salvaging as much as possible through what would, of necessity, be bargain-basement settlements. There being only 24 hours in the day, he could not do both.

He chose the latter course, and eventually succeeded in settling substantially all of the claims except those against United. Hence, while he was not working directly on the trial brief, he was working toward resolution of the cases.

On April 6th, the pending motions were heard.

In support of the motion to amend, Plaintiffs pointed out, inter alia, that:

> "(a) There is no basic change in the second amended complaints in the facts alleged;
>
> "(b) The First Amended Complaints already on file advise the defendants and each of them that they are being charged with monopolization and therefore no element of surprise is involved in regard to the specific delineation of a Section 2 case;

"(c) No motions for summary judgment (except for Centriline) have yet been filed, nor have the cases been set for trial;

"(d) Sections 1 and 2 of the Sherman Act are closely related and overlapping and ordinarily must be construed together for analytical purposes; hence there is no major alteration in the legal principles involved which the defendants will be called upon to meet;

"(e) The Defendants are represented by able law firms which are experienced in antitrust matters and to which Section 2 of the Sherman Act is, at least in the concrete pipe industry, for the most part an old acquaintance;

"(f) In addition to the three Perovich cases, the defendants are and/or were involved in a large number of other related antitrust cases (including the No-Joint cases) on behalf of the same clients, a number of which involve Section 2 of the Sherman Act. Accordingly, the attorneys and the clients are both undoubtedly familiar with the applicability of Section 2 of the Sherman Act to their business activities;

"(g) The Defendants collectively control a substantial portion of the inplace lining and rehabilitation of pipe business as well as the concrete pipe business and are undoubtedly well versed in market conditions and have at their disposal any necessary experts, market data and other factors which might arguably be peculiar to a Section 2 Sherman Act monopolization case. Sections 1 and 2 of the Sherman Act are admittedly separate. [C. T. 3723, line 14 to 3742, line 21]."

For a discussion of the merits of this motion, see C. T. 3721, line 7 to

The motion for modification of the protective order was supported by a number of affidavits. Les J. Weinstein, Esq., a lawyer with considerable antitrust experience, who had a bachelor of science degree in mechanical engineering and had been licensed to practice before the Patent Office, stated that he found most of the documents in the document depository unintelligible to some degree [C. T. page 3750, lines 27-32]. W. Z. Jefferson Brown, Esq., an attorney, stated that having read most of the depositions in the Perovich actions "was not sufficient to enable me to make a meaningful interpretation or thorough analysis of those documents which I examined in the document depository". [C. T. page 3712, lines 7-9]. Batris W. Perovich stated that:

> "based upon my experience in the business of inplace lining and/or rehabilitation of pipe, the knowledge that I have obtained from other depositions in the Perovich cases, and the knowledge I have obtained from examining the documents which were used as exhibits in connection with those cases, it is my belief that no person not thoroughly familiar with the inplace lining and/or rehabilitation industry, the names of the people involved therein, the trade terminology used in the industry, and the methods used in bidding could understand with sufficient clarity the documents that I have seen without assistance from someone knowledgeable in the industry or without spending lengthy periods of time dwelling over the documents.
>
> "I know of no person not presently associated in one way or another with one of the defendants herein who is presently available and willing to assist my attorneys in analyzing the documents contained in the document depository, except Charles O. Davin and myself." [C. T. page 3714, lines 15-31].

John Joseph Hall, Esq., a patent attorney, public accountant, and holder of a chemistry degree, stated that:

"With respect to both plaintiffs' and defendants' documents concerning the inplace lining and rehabilitation of pipe inplace, I was unable to properly evaluate such documents in a meaningful way by myself, because of the abbreviations used, the nomenclature of the lining business, variations in trade terminology and calculations peculiar to the lining business contained in such documents.

"Before using any documents in any discovery depositions, I found it necessary to consult with my clients regarding the meaning of information contained in such documents, because the information contained in such documents required interpretation and analysis which could be given only by a person experienced in the lining business. Such documents in discovery depositions included information regarding estimating data, pricing and cost date, and computations regarding lining jobs.

"The documents produced by the defendants in these cases pursuant to Court order which I have seen contain similar information to that contained in documents I used in discovery depositions and before these documents can be properly analyzed and evaluated they must, in my opinion, be inspected by a person familiar with the business of inplace lining of pipe.

"Due to the trial court's protective order of December 20, 1966, forbidding any of the Plaintiffs' to inspect Defendants' property, documents produced after October 24, 1966, I was unable to examine or evaluate such of defendants' documents that I did inspect after October 24, 1966, for purposes of trial preparation,

since I had no assistance from a person experienced in the lining business.

"Aside from plaintiffs' and defendants' employees I know of no person, either individually, or in a particular profession, who has the ability to properly examine or evaluate documents relating to the inplace lining business, particularly with respect to estimating lining jobs and determining whether such jobs were estimated or bid below cost.

"It is my belief, based upon my experience and my knowledge of the industry, that the problems involved in interpreting and analyzing these documents are not limited to problems of an accounting nature and that a person who could assist counsel would have to be or have been engaged in some capacity in the business of rehabilitating and/or lining pipe." [C. T. page 3718, line 11, to page 3719, line 18].

The original justification for the protective order was the protection of Defendants' "trade secrets". Plaintiffs pointed out that Perovich was no longer in the pipe lining business and had no present intentions of returning to it; that "the age of the information contained in the documents diminishes their usefulness in any event," and that Defendants "did not feel that the production of these documents presented such a threat to their ability to carry on their business in this allegedly competitive industry, that they needed any special provision barring the employees or agents of each other from access to the documentary depository or from making use of the material contained therein." [C. T. page 3737, line 15 to page 3738, line 20].

The motion for clarification and/or reconsideration with regard to

discovery involved certain interrogatories and documents sought in a motion to produce which pertained to a general conspiracy in the sale of concrete pipe. Defendants had filed objections to the interrogatories and motion to produce; the principal ground of their objection was that, absent a prior showing of a link between the general conspiracy and the instant actions, such discovery was improper. [C.T. page 3709, lines 14-26].

Plaintiffs pointed out to the District Court that such a restrictive position was in contradiction of, and would constitute reversible error under, the decision of the United States Supreme Court in Continental Ore Co. v. Union Carbide, 370 U.S. 690, 698-700 (1962); and, in fact, since Judge Pence had permitted discovery with regard to the general conspiracy in the "No-Joint" cases, other "western pipe case" actions, without the showing of such a prior link [C.T. page 3741, lines 13-26], consistency would seem to have required the same decision in the Perovich actions.

Defendants disputed Plaintiffs' position on factual as well as legal grounds. For example, United's response to the sworn statements, referred to supra, that the documents in the document depository were not unintelligible and could not be adequately interpreted except by someone in the inplace mining industry, was the unverified assertion during oral argument of United's counsel, ". . . it is a rather simple task to go through . . . and analyze his stuff. My Secretary did it . . ." [R.T. 3/18/67, page 42, lines 12-14].[35]

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[35] When, however, Defendants' counsel was asked the meaning of a term selected from one of the documents, "modified proctor", none of them, including United's counsel, was able to do so [R.T. 3/18/67, page 67, line 16 to page 68, line 9].

Mr. Weinstein objected vehemently and repeatedly to such unsupported unsworn assertions of United's counsel, pointing out that their effect was to deny him a meaningful opportunity to respond, but the Court's attitude is evidenced by the following:

> "Now, now, counsel [to Mr. Weinstein], I don't take this lack of affidavits nearly as serious as you do. . . . I judge each man that appears before me based upon his attitude and my judgment of him." [R.T. 4/6/67, page 33, lines 5-9].

Thus, the factual showing upon which Plaintiffs based their motions was uncontroverted and demonstrated that the motions were essential in order to permit Plaintiffs' to properly present their cases. Furthermore, while the granting of the motions or any of them would have required, in the Court's own view a delay in the filing of the trial brief, there is no reason to believe that such granting would have delayed the trial. Judge Pence himself had clearly indicated that the trial would not be until late 1967 or 1968.

Nevertheless, the motions were denied. (See footnote 15, supra).[36]

In his "Memorandum and Order of Dismissal, the Court implies that

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[36] In the interests of avoiding unnecessary repetition, Appellant will not burden this Court with a separate section devoted to the review in and of itself of the denial of these motions by the District Court. Nonetheless, this Court does have the power to review the denials on the instant appeal [Siebrand v. Gosnell, 234 F. 2d 81 (9th Cir. 1961)] and Appellant is seeking such review herein. Appellant believes that the action of the District Court in denying these motions was erroneous and should be reversed, thus obviating possible review of the rulings on a future appeal. [For an extended discussion of the motions, see C.T. 3653-3744].

Plaintiffs' action in filing a "Notice of Refusal to Pay Sanctions", and then a request for leave to pay the sanctions and an extension, was some sort of a deliberate tactic by Plaintiffs. [C. T. 3972, lines 4-27]. But what conceivable purpose could Plaintiffs have hoped to serve by filing the Notice of Refusal if they at the time intended thereafter to ask for leave to pay sanctions and for an extension? Certainly, it would not assist them, should they thereafter seek a further extension. Its obvious purpose was exactly that which it purported to be - - to advise the District Court of Plaintiffs' intentions.

Later, however, Plaintiffs' circumstances changed. The settlements generated funds from which the sanctions could be paid, and reduced the burden of the litigation. Consequently, the remaining Plaintiffs felt that in view of this lightened burden, it would be possible for them to prepare a trial brief by June 15 and on April 25, requested leave to do so and to pay the sanctions to United.

Appellant respectfully submits that these facts belie the charge that the "plaintiffs deliberately, openly and knowingly defied" the Court's orders, or that Plaintiffs had a "dilatory history" - - the grounds on which dismissal was predicated. [C. T. 3973, lines 3-6]. It would perhaps be more accurate to say that after Perovich's discharge of Hall, the District Court created an appearance of indulgence to Plaintiffs without ever really giving them an opportunity to do what they had to do. The District Court says that the "courtroom is not a race track on which a party can jockey at will without fear of being disqualified." [C. T. 3972, lines 20-22]. This is true, but neither is it a baseball diamond on which a judge can emulate a famous pitcher by throwing fast balls at counsel. Perovich is not above reproach in his conduct of the trial; neither are most litigants. The record shows that Perovich and his counsel, through four long years, prosecuted his actions

vigorously. For the District Court to have dismissed the action below when it was in such an advanced state, when Perovich and his counsel were working so feverishly to undo whatever wrong Perovich may have done by dismissing Hall, was a grave injustice. It should not be allowed to stand.

B. APPELLANT BELIEVES THAT THE IMPOSITION OF SANCTIONS, WITH THE THREAT OF DISMISSAL IF THEY WERE NOT PAID, WAS IMPROPER IN VIEW OF THE DISTRICT COURT'S ACKNOWLEDGMENT THAT THE ACT FOR WHICH THE SANCTIONS WERE IMPOSED DID NOT ITSELF WARRANT DISMISSAL. IN ANY EVENT, HOWEVER, IT WAS MANIFESTLY AN ABUSE OF DISCRETION FOR THE DISTRICT COURT TO REFUSE TO PERMIT THE SANCTIONS TO BE PAID ONLY EIGHTEEN DAYS LATE WHEN PLAINTIFF DID NOT HAVE THE FUNDS AVAILABLE ON THE DUE DATE, AND THERE WAS NO SHOWING WHATEVER THAT THE LATE PAYMENT WOULD IN ANY WAY PREJUDICE THE REMAINING DEFENDANT.

In determining whether the District Court acted properly in dismissing he action below for failure of Appellant to pay sanctions on April 7, the initial uestion to be considered is whether the order imposing sanctions was itself awful. Appellant submits that it was not.

First, and most basically, Appellant does not believe that the conduct f the Plaintiff for which sanctions were imposed -- the discharge of Mr. Hall nd consequent failure of Plaintiff to meet the deadline for the trial brief set n Pre-Trial Orders No. 4 and 5[37] -- warranted their imposition. (See Section V, A, supra).

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7 In fact, the December 15 deadline contained in Pre-trial Order No. 4 would not have been complied with in any event, despite Mr. Hall's seven-day-week working schedule, and Judge Pence had encouraged Mr. Hall to take more time if he felt he needed it. Whether Mr. Hall

Secondly, let us assume arguendo that Perovich's discharge of Mr. Hall was in itself sufficient to justify the imposition of sanctions--this despite[38] the vigor with which the Perovich actions had heretofore been prosecuted; despite the fact that Perovich's action was motivated not by a desire to delay proceedings, but rather to prevent delay; despite the fact that Perovich did everything within his power to ameliorate the condition which his discharge of Mr. Hall had created, including(and it must have required no little pride-swallowing) asking Mr. Hall to return to the cases. The sanctions were still unlawful because of the means by which they were assessed.[39] The purpose of the sanctions was to compensate Defendants for additional legal expense which they had been caused by Mr. Hall's discharge, yet the amount of the sanctions was assessed on the basis of unverified statements of Defendants' counsel, which included inter alia charges for time spent after the date on which the court ordered the sanctions imposed and even time spent by counsel of the various Defendants in conferring with each other and about the sanctions. Is the imposition of sanctions on this kind of a basis compatible with proper judicial process?[40]

(continued)

would have been able to complete the trial brief by January 13, the due date specified in Pretrial Order No. 5, is possible, but in view of Mr. Halls' testimony (R. T. 1/17/67; page 70, line 18 to page 73, line 17), and not withstanding his representation to the contrary, far from certain.

38 Since sanctions were ordered imposed upon Plaintiff on January 17, 1967, (though the formal Order was not entered until later), sanctions were proper only if events up to that date--without regard to subsequent developments in the case--warranted them.

39 Indeed, Judge Pence followed the novel procedure of at least technically ordering the sanctions paid to Defendants' counsel rather than to Defendants themselves.

40 Equally shocking is Judge Pence's treatment of Inplace Linings, Inc., the Plaintiff in No. 63-321, of which Mr. Davin was president. Any "wrong" that may have been committed in discharging Mr. Hall was committed by Perovich, and by Perovich alone. Indeed, the close identity of the Inplace Linings action with the two actions in which Perovich was interested came

Finally, whether or not the sanctions were deserved and properly assessed by Judge Pence, the fact remains that Plaintiffs tendered such sanctions as soon as the necessary funds became available. It is true that his tender was not made until April 25, 1967, eighteen days after the due date of April 7, 1967. But the ostensible purpose of the sanctions was to compensate Defendants for the injury which the discharge of Mr. Hall had caused them. There is no reason whatever to believe that such compensation to the one remaining defendant would have been less adequate if paid on April 25, than on April 7. Indeed, because of the settlement of various actions, the sanctions payable to United's counsel had been reduced from almost $1,000.00, to $328.08; hence, since the sanctions were a consideration in the settlement, by April 25 United had already received partial compensation.

Appellant submits that the sanctions were improperly assessed against him; and even if they were not, there was substantial compliance with the Court's order imposing such sanctions.

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continued)
about because the District Court, presumably in the interests of economy of judicial administration, had ordered the three cases consolidated for pre-trial and discovery purpose. [C. T. page 1429]. Yet, Judge Pence, despite Inplace Linings' total innocence, imposed the sanctions, with the underlying threat of dismissal, upon the three actions jointly and severally and without distinction.

CONCLUSION

In his Memorandum and Order of Dismissal, Judge Pence depicts an indulgent court finally driven to resort to the ultimate sanction of dismissal by a contumacious litigant who, in his words, treated the Court like a "race track" and "fouled once too often". While he is undoubtedly sincere in this appraisal; nonetheless it is evident that such a characterization is wholly incorrect. On the contrary, the Plaintiffs made every attempt to go forward with the cases, and the record on appeal -- including that portion dealing with the period after new counsel were substituted in -- is mute testimony to their efforts. The only act of Appellant which was even arguably wrongful -- his discharge of his exhausted attorney -- was motivated not by a desire to delay proceedings but rather to accelerate them, and Judge Pence acknowledged that it did not warrant dismissal.

Even the best of judges occasionally make bad mistakes. Judge Pence is a good judge who in handling the nearly 400 "western pipe cases" assumed and discharged a burden of monumental proportion. It is not surprising that in the course of disposing of such a burden there should be a few casualties, and this case is one of them. Fortunately, it can still be saved.

Appellant requests that the order of dismissal and denial of Appellant's motion for leave to file a Second Amended Complaint in the action below (a copy of Appellant's proposed Second Amended Complaint is found at C. T. pages 3656-3669), for an order vacating or modifying the Protective Order re

Defendant's Documents dated December 30, 1966 so as to permit Perovich to have access to the documents produced by the defendants [C. T. 3654, line 11-13] and for the Court to reconsider and/or clarify its ruling of October 3, 1966 with respect to certain discovery matters and enter an order requiring United to answer Plaintiff's Revised Interrogatories Numbers 2(b) (2) and (3), 4(b) and (c), 5, 6, 10(b) and (c), 11(b) and (c), 12, 14(b) and (c), 15, 16, 21, 22, 23(b) and (c), 24, 25(b) and (c), 26, and 27(b) and (c), and produce the documents as requested in Plaintiffs' Revised Motion for Production of Documents, Items 11 through 16 [C. T. 3654, lines 14-21], be reversed and that the action below be remanded to the District Court for further proceedings.

Respectfully submitted,

McKENNA & FITTING
LES J. WEINSTEIN
AARON M. PECK

Attorneys for Appellant
Batris W. Perovich, dba
B. W. Perovich Construction Co.